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No. 05-380

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
American Dredging Co. v. *Miller*, 510 U.S. 443 (1994)	2
Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002)	6
Board of Educ. v. *Mergens*, 496 U.S. 226 (1990)	5
City of Akron v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983)	3
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	6
Connecticut v. *Menillo*, 423 U.S. 9 (1975)	10
Dickerson v. *United States*, 530 U.S. 428 (2000)	6
H.L. v. *Matheson*, 450 U.S. 398 (1981)	10
Johanns v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005)	2
Jones v. *United States*, 463 U.S. 354 (1983)	4, 5
Kansas v. *Hendricks*, 521 U.S. 346 (1997)	4
Lambert v. *Yellowley*, 272 U.S. 581 (1926)	4, 5
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978)	6
Ohio v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990)	10
Planned Parenthood of S.E. Pa. v. *Casey*, 505 U.S. 823 (1992)	5, 8, 9
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	5, 6
Sable Communications of Cal., Inc. v. *FCC*, 494 U.S. 115 (1989)	6
Simopoulos v. *Virginia*, 462 U.S. 506 (1983)	10
Stenberg v. *Carhart*, 530 U.S. 914 (2000)	2, 9, 10
Texas v. *Johnson*, 491 U.S. 397 (1989)	2
Tucson Woman's Clinic v. *Eden*, 379 F.3d 531 (9th Cir. 2004)	5
Turner Broad. Sys., Inc. v. *FCC*, 520 U.S. 180 (1997)	4, 5, 8
United States v. *Eichman*, 496 U.S. 310 (1990)	2
United States v. *Morrison*, 529 U.S. 598 (2000)	6

Cases—Continued: Page

United States v. *O'Brien*, 391 U.S. 367 (1968) 5
United States v. *Salerno*, 481 U.S. 739 (1987) 8
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 2
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 5

Constitution and statute:

U.S. Const.:
Amend. I (Establishment Clause) 5
Amend. V (Due Process Clause) 5
Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 ..... 1, 2, 6, 7, 10
§ 2(14), 117 Stat. 1204 5
§ 2(14)(O), 117 Stat. 1206 7

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The court of appeals held that the federal Partial-Birth Abortion Ban Act of 2003 (the Act) was facially invalid because it lacked an express statutory exception for cases in which a partial-birth abortion is necessary to preserve the health of the mother. That decision overrides Congress's carefully considered finding, following nine years of hearings and debates, that partial-birth abortion is *never* necessary to preserve a mother's health. Respondents contend only briefly that the court of appeals' decision does not warrant this Court's review, and instead devote their efforts largely to arguing the merits of the case. Their arguments not only fail to justify the Act's facial invalidation, but, more to the point, provide no reason for denying the writ. Because the court of appeals invalidated a landmark Act of Congress, and because the court of appeals' decision conflicts with decisions of this Court, the petition for certiorari should be granted.

1. Remarkably, respondents assert (Br. in Opp. 16) that "the Government's contention that the Court should grant certiorari simply because the Eighth Circuit declared unconstitutional an act of Congress is unpersuasive." This Court, however, routinely exercises its certiorari jurisdiction to review a decision invalidating a federal statute. See Pet. 10 (citing numerous cases). In fact, respondents do not cite a

single case in which this Court has *declined* to grant the government's petition in such circumstances. Particularly in view of the importance of the Act and the national interest in the resolution of the question presented by this case, see, *e.g.*, Br. of Amici Texas et al. 1-2, there is no reason for deviating from that settled practice here.[1]

2. Respondents contend (Br. in Opp. 14-16) that the court of appeals' decision was "mandated" by this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). That contention —which is merely an attempted defense of the court of appeals' decision on the merits—is incorrect. In *Stenberg*, the Court held that Nebraska's statute banning partial-birth abortion was invalid because it lacked a health exception. 530 U.S. at 930. The Court concluded that the statute was required to contain a health exception after resolving the "factual question" whether the statute would pose "significant health risks for women." *Id.* at 932. In *Stenberg*, of course, no federal statute was at issue, and there were no congressional findings on the need for a health exception. At most, therefore, the Court could have established a rule of decision for cases in the *absence* of congressional findings; it was "quite impossible" for the Court to establish a rule of decision even in the face of such findings. *American Dredging Co.* v. *Miller*, 510 U.S. 443, 457 (1994). Respondents

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[1] Respondents attempt to distinguish the cases in which this Court has granted certiorari to review decisions invalidating federal statutes on the ground that "[i]n none of those cases did the Court grant certiorari to review a decision that followed its precedent to revisit issues that had already been decided by the Court." Br. in Opp. 16. That argument is question-begging and incorrect in any event. This Court has granted plenary review of decisions holding a federal statute unconstitutional even where the parties seeking to invalidate the statute contended that the outcome was dictated by a recent decision of the Court. See, *e.g.*, *Johanns* v. *Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005) (rejecting argument, first advanced in brief in opposition, that case was controlled by *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001)); cf. *United States* v. *Eichman*, 496 U.S. 310, 313-318 (1990) (agreeing that case was controlled by *Texas* v. *Johnson*, 491 U.S. 397 (1989)).

point to no language in *Stenberg* suggesting that the Court intended to foreclose Congress from deliberating on this issue, considering the latest and best available medical evidence, and making its own findings. If read in the fashion respondents suggest, *Stenberg* would have profound separation-of-powers implications, given the "superior factfinding capabilities" of legislatures compared to courts. *City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 n.4 (1983) (*Akron I*) (O'Connor, J., dissenting).

Respondents assert that the evidence they presented in the district court concerning the medical necessity of partial-birth abortion was "even * * * strong[er]" than the evidence presented by the plaintiffs in *Stenberg*. Br. in Opp. 15, 16. Even assuming, *arguendo*, that respondents' characterization of the evidence before the district court were correct (and it is not), it would be both counterproductive (because it would underscore that *Stenberg* rested on the district court record, rather than settling the issue for all time) and irrelevant (because it would show that respondents would prevail only if Congress's findings concerning the medical necessity of partial-birth abortion were entitled to *no* deference). Because *Stenberg* does not suggest, much less decide, that courts considering challenges to statutes regulating abortion should discount, let alone disregard altogether, congressional findings, respondents' contention that *Stenberg* controls the outcome of this case should be rejected.

3. Respondents also argue the merits of the deference owed to Congress's findings in this context. Although those arguments join issue on the question presented, they provide no basis for denying plenary review of the question.

a. Respondents contend (Br. in Opp. 16-25) that, although this Court has deferred to congressional findings in a variety of constitutional contexts, such deference is inappropriate in this context. Respondents, however, offer no persuasive basis for barring deference here.

First, respondents assert (Br. in Opp. 18-20) that the principle of deference articulated in *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*), is inapplicable where the findings at issue are not "predictive." That distinction, however, lacks support and is illusory in any event. Contrary to respondents' assertion (Br. in Opp. 18), Congress was indeed "making predictions about the *future* impact of legislation" in this case: specifically, predictions concerning the likely health effects of prohibiting a particular type of abortion procedure. To be sure, those predictions were based on evidence concerning the "current state of medicine" (*id.* at 19), just as the predictions at issue in *Turner II* were based on Congress's assessment of the then-current conditions in the local broadcasting industry. See 520 U.S. at 195-196. It would be illogical, however, to defer to congressional findings when they are based wholly on conjecture, but not when they are grounded on hard data. To the contrary, a fundamental rationale for deference to congressional findings is that Congress "is far better equipped than the judiciary to amass and evaluate * * * *data* bearing upon legislative questions." *Id.* at 195 (emphasis added) (quotation marks omitted). It is thus unsurprising that this Court has deferred to Congress's predictive judgments on medical and scientific issues, even (or especially) where those judgments were based on the "current state" of the evidence. See, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 363-366 & n.13 (1983); *Lambert* v. *Yellowley*, 272 U.S. 581, 588-597 (1926). Indeed, legislatures are entitled to the "widest latitude" in resolving disagreements among medical professionals. *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997).[2]

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[2] Respondents contend (Br. in Opp. 21) that *Jones*, *Lambert*, and other cases are distinguishable on the ground that "none of those cases involved deference to legislative findings." Although Congress may not have made *express* legislative findings in those cases like the findings at issue here, Congress unquestionably made *implicit* findings about a disputed question of fact that was relevant to the constitutional claim at issue. If any-

Second, respondents suggest (Br. in Opp. 20-24) that deference to congressional findings is never appropriate in cases "involving a burden on a constitutional right, infringement of which is subject to heightened scrutiny." That contention, however, cannot be reconciled with *Turner II*, which involved a content-neutral regulation subject to intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). See *Turner II*, 520 U.S. at 185, 189-190. Indeed, courts have noted that the "undue burden" standard applicable to abortion regulations (which effectively replaced the previously applicable strict-scrutiny standard, see *Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 869-879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)) closely resembles intermediate scrutiny, see, *e.g.*, *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 549 (9th Cir. 2004). Moreover, as discussed at greater length in the petition (Pet. 12-15), this Court has deferred to congressional findings in a wide range of other contexts involving fundamental constitutional rights. See, *e.g.*, *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250-251 (1990) (Establishment Clause); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-334 (1985) (Due Process Clause); *Jones*, 463 U.S. at 361 (Due Process Clause); *Rostker* v. *Goldberg*, 453 U.S. 57, 69 (1981) (equal protection component of Due Process Clause); *Lambert*, 272 U.S. at 588 (Due Process Clause).[3]

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thing, deference is all the more appropriate where, as here, Congress deliberately made express findings based on testimony and other evidence received during extensive legislative hearings. See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14), 117 Stat. 1204.

[3] Respondents' efforts to distinguish those cases (Br. in Opp. 23-24) are unavailing. Respondents suggest that, in *Mergens* and *Walters*, the Court did not simply defer to Congress, but instead reviewed Congress's findings in light of other evidence. In considering that evidence, however, the Court acted entirely consistently with the principle that congressional findings are entitled to deference only where a reviewing court is satisfied that "Congress has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195 (internal quotation marks omitted).

Third, respondents argue (Br. in Opp. 24-25) that deference to Congress's findings would be inappropriate because Congress was attempting to "redefine the scope of a constitutional right" and "subvert this Court's prior interpretation of a constitutional issue." In passing the Act, however, Congress was not attempting to displace the constitutional *rule* applied in *Stenberg* (*i.e.*, the "undue burden" test), but instead merely was making findings on a factual issue (*i.e.*, whether partial-birth abortion is ever medically necessary) relevant to the *application* of that rule. This case is therefore crucially different from cases in which Congress either sought to supersede a constitutional ruling of this Court, see *Dickerson* v. *United States*, 530 U.S. 428 (2000); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), or made insufficient findings to sustain a statute's constitutionality, see *United States* v. *Morrison*, 529 U.S. 598 (2000).

b. Contrary to respondents' suggestion (Br. in Opp. 25-27), Congress's findings concerning the medical necessity of partial-birth abortion are entitled to deference under the

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Respondents suggest that *Rostker* is distinguishable on the ground that it involves the *sui generis* context of deference to congressional judgments concerning the military. In *Rostker*, however, the Court first noted the general principle that congressional judgments on factual issues are "customar[ily]" entitled to deference, 453 U.S. at 64, before proceeding to note that deference is *particularly* appropriate where congressional judgments concerning the military are concerned, *id.* at 64-65.

Respondents rely (Br. in Opp. 20-21) on this Court's decisions in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989); and *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). Those cases, however, are inapposite. *Landmark* did not even involve a federal statute; *Sable* rejected a request for deference on the straightforward ground that "the congressional record contain[ed] no legislative findings" germane to the constitutional question presented, 492 U.S. at 129-130; and *Free Speech Coalition* did not reject a congressional finding that "virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct," but instead concluded that any such finding was legally irrelevant on the ground that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," 535 U.S. at 253.

standards of *Turner II*. The court of appeals nevertheless refused to apply any deference to Congress's factual findings, reasoning that "the government's argument regarding *Turner* deference is irrelevant to the case at hand." Pet. App. 15a. Respondents argue (Br. in Opp. 25) that the district court *did* apply deference, but concluded that Congress's findings were not supported by substantial evidence. Pet. App. 463a, 476a-477a. In analyzing Congress's findings, however, the district court asked the wrong question: rather than asking whether substantial evidence supported Congress's conclusion that partial-birth abortion was never necessary to preserve a woman's health, the court asked whether substantial evidence supported the proposition that *no substantial medical authority* supported the proposition that partial-birth abortion was *ever* necessary to preserve a woman's health. *Id.* at 460a-461a. Even assuming that is the correct question for a court to ask in the *absence* of congressional findings, it clearly is the wrong standard to apply in evaluating those findings.

If the district court had properly applied the standards articulated in *Turner II*, it would have concluded that Congress's findings—specifically, its ultimate finding that "partial-birth abortion is never medically indicated to preserve the health of the mother," see Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(O), 117 Stat. 1206—were entitled to deference. As the district court acknowledged, most of the physicians who testified before Congress supported the Act. Pet. App. 58a. That congressional testimony was reinforced by various written materials that Congress also considered, including statements from leading physician groups, articles in professional journals, and other submissions from individual physicians. And it was supplemented by ample testimony from physicians at trial. At most, respondents simply highlight other record evidence to demonstrate that contrary evidence was presented to Congress (and introduced at trial). But that fact just under-

scores that Congress received information from a wide variety of sources before making its findings. Under *Turner II* and separation-of-powers principles, the correct inquiry is not whether a reviewing court would reach the same determination as Congress on the basis of the record that Congress had before it; instead, it is simply whether there was sufficient evidence to suggest that *Congress's* determination was reasonable. See, *e.g.*, 520 U.S. at 210-211.[4] Because the evidence before Congress, especially as supplemented by the trial record, was more than sufficient to support Congress's determination concerning the medical necessity for partial-birth abortion, that determination is entitled to deference.

4. Respondents contend (Br. in Opp. 27-29) that the court of appeals correctly held that an abortion statute that lacked a health exception was facially invalid if the regulated procedure was arguably necessary to preserve the health of the mother only in *some* instances. That contention lacks merit.

Respondents suggest (Br. in Opp. 28) that a plaintiff bringing a facial challenge to an abortion statute that lacks a health exception need not show that such an exception is necessary in all cases, see *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), or even a "large fraction" of cases, see *Casey*, 505 U.S. at 895, because this Court's decision in *Casey* "did not apply the 'large fraction' test to its evaluation of the

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[4] As respondents note (Br. in Opp. 17), the precise inquiry is whether, "in formulating its judgments, Congress has drawn *reasonable inferences* based on substantial evidence." *Turner II*, 520 U.S. at 195 (emphasis added) (quotation marks omitted). Although respondents contend (Br. in Opp. 17) that "the Government proposes on appeal a watered down version of the *Turner* test" by "omit[ting] the critical first part of the test" (*i.e.*, "whether Congress's conclusion was 'reasonable'"), the petition specifically quoted the foregoing formulation of the *Turner II* inquiry. See Pet. 11. In any event, respondents do not explain how an inquiry concerning whether Congress's findings are "reasonable" would differ from an inquiry concerning whether those findings are supported by "substantial evidence," and the findings at issue in this case are reasonable by any measure in light of the record before Congress.

medical emergency exception." In the portion of *Casey* on which respondents rely, however, the Court was considering only an exception for medical emergencies—not the broader health exception that respondents seek. See *id.* at 879. And the Court did not address whether a statutory exception for medical emergencies was necessary in the first place, but instead merely held that the *definition* of a medical emergency in the statutory exception was constitutionally sufficient. See *id.* at 880. Moreover, *Casey* did not suggest that a defect in the medical-emergency exception would result in facial invalidation, but rather would require only limiting "the restrictive operation of the provision." *Ibid.* *Casey* therefore does not support either the proposition that a general health exception is automatically required in every abortion statute or the proposition that a general health exception is required upon a showing that the statute would impose a health risk only in some instances. Nor does it support the proposition that the absence of a general health exception requires facial invalidation of a statute in its entirety, regardless of its constitutional applications.

In the alternative, respondents seemingly embrace the suggestion (Br. in Opp. 28) that *Stenberg* adopted a more permissive standard for facial challenges than either the "no set of circumstances" standard from *Salerno* or the "large fraction" standard from *Casey*. Although the Court did note in *Stenberg* that partial-birth abortion was *itself* a relatively rare procedure, the Court did not further hold that the statute required a health exception because partial-birth abortion was *medically necessary* only in a small percentage of instances in which the statute applied. See 530 U.S. at 934. Respondents' reading of *Stenberg* would not only belie the Court's assertion that the requirement of a health exception constituted "simply a straightforward application of [*Casey*'s] holding," 530 U.S. at 938, but would (contrary to respondents' unelaborated assertion, Br. in Opp. 29) entirely subvert the *Salerno* standard by allowing a plaintiff to ob-

tain facial invalidation of a statute simply by showing that the statute had a few unconstitutional applications. That reading of *Stenberg* would be difficult to reconcile with a host of the Court's other decisions, see *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (*Akron II*); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975), which either reject overbreadth analysis in the abortion context (*H.L.*, 450 U.S. at 405-407), apply a *Salerno*-type test to facial challenges to abortion statutes (*Akron II*, 497 U.S. at 514), or permit as-applied challenges to abortion statutes that were susceptible to unconstitutional applications (*Simopoulos*, 462 U.S. at 510; *Menillo*, 423 U.S. at 11). Even if respondents have the correct view of *Stenberg*, this Court should grant certiorari to clarify the status of those precedents. Apart from refusing to defer to Congress's findings, therefore, the court of appeals also erred by holding that the statute was facially invalid because its lack of a health exception could be problematic in *some* applications.[5]

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
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DECEMBER 2005

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[5] As explained in the petition (Pet. 22-24), the Court's decision in *Ayotte* v. *Planned Parenthood of Northern New England*, No. 04-1144 (argued Nov. 30, 2005), could shed light on certain aspects of the question presented in this case. The Court, however, should grant certiorari outright in this case and proceed with its disposition. The court of appeals invalidated a landmark Act of Congress and enjoined all of its pre-viability applications. Granting certiorari now would expedite the ultimate resolution of the Act's constitutionality and would enable the Court more fully to consider the ramifications of its decision in *Ayotte* on the appropriate standard for facial challenges to abortion statutes and on the necessity for a health exception.